

## **24<sup>TH</sup> FEDERAL LITIGATION COURSE**

### **REVIEWABILITY**

#### **I. INTRODUCTION.**

- A. Meaning of nonreviewability.
- B. Development of Reviewability Doctrine.
  - 1. 19th Century: Presumption of nonreviewability in cases involving the federal government. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840).
  - 2. Early 20th Century:
    - a. Demise of presumption of nonreviewability in non-military cases. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).
    - b. Continued presumption of nonreviewability in military cases. *Reaves v. Ainsworth*, 219 U.S. 296 (1911); *Orloff v. Willoughby*, 345 U.S. 83 (1953).
  - 3. Late 20th Century: Demise of the presumption of nonreviewability in military cases. *Harmon v. Brucker*, 355 U.S. 579 (1958).

#### **II. TYPES OF CHALLENGES THAT ARE REVIEWABLE.**

- A. Lack of Court-Martial Jurisdiction over the Person.
  - 1. Failure to acquire military status. *Koh v. Secretary of the Air Force*, 719 F.2d 1384 (9th Cir. 1983); *Allen v. Weinberger*, 546 F. Supp. 455 (E.D. Mo. 1982).
  - 2. Termination of military status. *Taylor v. United States*, 711 F.2d 1199 (3d Cir. 1983); *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).
- B. Violation of a Statute or a Regulation.
  - 1. Statute. *Harmon v. Brucker*, 355 U.S. 579 (1958).

2. Regulation. *Dodson v. United States*, 988 F.2d 1199 (Fed. Cir. 1993);
- C. Violation of the Constitution.
1. Unconstitutional action.
    - a. Denial of due process. *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991); *Rustad v. United States Air Force*, 718 F.2d 348 (10th Cir. 1983).
    - b. Violation of a substantive constitutional right. *Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980).
  2. Unconstitutional program or policy. Compare *Goldman v. Weinberger*, 475 U.S. 503 (1986), *Meinhold v. Department of Defense*, 34 F.3d 1469 (9th Cir. Aug. 31, 1994) and *Steffan v. Aspin*, 41 F.3d 677 (D.C. Cir. 1994), with *Khalsa v. Weinberger*, 787 F.2d 1288 (9th Cir. 1986).
- D. Abuse of Discretion. *Cherry v. United States*, 697 F.2d 1043 (Fed. Cir. 1983).

### **III. REVIEWABILITY OF MILITARY DECISIONS.**

- A. Administrative Procedure Act (APA), 5 U.S.C. § 701.
1. Applicability to the armed forces.
    - a. General. The APA applies to the military in peacetime. *Ornato v. Hoffman*, 546 F.2d 10 (2d Cir. 1976).
    - b. Exceptions:
      - (1) Courts-martial and military commissions.
      - (2) Military authority exercised in the field in the time of war or in occupied territory.
  2. Reviewability under the APA.

- a. General rule: Federal administrative actions presumptively reviewable under the APA. 5 U.S.C. § 702; *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (There is a “strong presumption that Congress intends judicial review of administrative action.”).
- b. Exceptions:
  - (1) "Statutory preclusion" -- another statute precludes judicial review. 5 U.S.C. § 701(a)(1).
    - (a) General. To overcome the presumption of reviewability there must be "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 673, quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984). See also *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986).
    - (b) Examples.
      - i) Military Claims Act, 10 U.S.C. §§ 2733, 2735. *Hata v. United States*, 23 F.3d 230 (9th Cir. 1994).
      - ii) National Guard Claims Act, 32 U.S.C. § 715. *Rhodes v. United States*, 760 F.2d 1180 (11th Cir. 1985).
      - iii) Civil Service Reform Act, 5 U.S.C. §§ 4301-4305. See *Bush v. Lucas*, 462 U.S. 367 (1983); *Jones v. TVA*, 948 F.2d 258 (6th Cir. 1991).
  - (2) Agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2).

- (a) General rule: An action is committed to agency discretion by law if the statute under which the action was taken is drawn in such broad terms that in a given case "there is no law to apply." Webster v. Doe, 486 U.S. 592 (1988); Kreis v. Secretary of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989); see also Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993) (judicial review is only appropriate where the Secretary's discretion is limited and there are tests and standards against which the court can measure his conduct).
- (b) Factors to be considered. American Fed'n of Gov't Employees v. Brown, 680 F.2d 722 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); AFGE v. United States, 602 F.2d 574 (3d Cir. 1979).
  - i) The broad discretion given an agency in a particular area of operation.
  - ii) The extent to which the challenged action is the product of political, economic, or managerial choices that are inherently not subject to judicial review.
  - iii) The extent to which the challenged agency action is based on some special knowledge or expertise.
- (c) Effect of agency regulations and policies. See Dodson v. United States, 988 F.2d 1199 (Fed. Cir. 1993); Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985). Cf. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1953); Accardi v. Shaughnessy, 347 U.S. 260 (1954) (agencies must follow their own regulations).
- (d) Agency decisions not to use enforcement powers -- presumptively nonreviewable. Heckler v. Chaney, 470 U.S. 821 (1985).

B. The "Mindes Test."

1. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).
  - a. Threshold allegations.
    - (1) Violation of a constitutional, statutory, or regulatory provision.
    - (2) Exhaustion of administrative remedies.
  - b. Balancing factors:
    - (1) Nature and strength of plaintiff's claim.
    - (2) Potential injury to plaintiff if review is refused.
    - (3) Interference with the military function.
    - (4) Degree of military expertise and discretion involved.
2. Examples: Wenger v. Monroe, 282 F.3d 1068 (9<sup>th</sup> Cir. 2002); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Saum v. Widnall, 912 F.Supp. 1384 (D. Colo. 1996).
3. Application of Mindes in the federal courts.
  - a. Courts that follow Mindes:
    - (1) 1st Circuit: Navas v. Gonzalez Vales, 752 F.2d 765 (1st Cir. 1985).
    - (2) 4th Circuit: Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985).
    - (3) 5th Circuit: NeSmith v. Fulton, 615 F.2d 196 (5<sup>th</sup> cir. 1980); West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978).

- (4) 9th Circuit: *Wenger v. Monroe*, 282 F.3d 1068 (9<sup>th</sup> Cir. 2002); *Barber v. Widnall*, 78 F.3d 1419 (9<sup>th</sup> Cir. 1996); *Christoffersen v. Washington State National Guard*, 855 F.2d 1437 (1988); *Sandidge v. Washington*, 813 F.2d 1025 (9th Cir. 1987). But see *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc) (Mindes doctrine does not apply to equitable estoppel against the military), cert. denied, 498 U.S. 957 (1990).
- (5) 10th Circuit: *Clark v. Widnall*, 51 F.3d 917 (10<sup>th</sup> Cir. 1995); *Costner v. Oklahoma Army National Guard*, 833 F.2d 905 (10th Cir. 1987).

b. Courts that may follow Mindes:

- (1) 6th Circuit: *Schultz v. Wellman*, 717 F.2d 301 (6th Cir. 1983).
- (2) D.C. Circuit: *Kreis v. Secretary of the Air Force*, 648 F. Supp. 383 (D.D.C. 1986), aff'd in part rev'd in part, 866 F.2d 1508 (D.C. Cir. 1989). But see *Doe v. Rumsfeld*, 297 F.Supp. 2d 119 (D.D.C. 2003)(*Kreis* “suggests to this court that the D.C. Circuit may not look particularly favorably upon the *Mindes* analysis.”).
- (3) Federal Circuit: *Dodson v. United States*, 988 F.2d 1199, 1207 n.7 (Fed. Cir. 1993).

c. Courts that do not follow Mindes:

- (1) 2d Circuit: *Jones v. New York State Div. of Mil. And Nav. Affairs*, 166 F.3d 45 (2d Cir. 1999); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976). But see *Furman v. Edwards*, 657 F. Supp. 1243 (D. Vt. 1987) (suggesting Mindes consistent with 2d Circuit decisions).
- (2) 3d Circuit: *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986); *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981).
- (3) 7th Circuit: *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993), cert. denied, 510 U.S. 933 (1993).

- (4) 8<sup>th</sup> Circuit: *Watson v. Arkansas Nat. Guard*, 886 F.2d 1004 (1989).
- (5) 11<sup>th</sup> Circuit: *Winck v. England*, 327 F.3d 1296 (11<sup>th</sup> Cir. 2003).

This page left intentionally blank.